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No. 80-1199

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE AMERICAN TOBACCO COMPANY, TOBACCO WORKERS' INTERNATIONAL UNION, AND LOCAL 182 OF TOBACCO WORKERS' INTERNATIONAL UNION,

Petitioners,

—v.—

JOHN PATTERSON, MARION MOSHOE, EDMUND PAGE, JAMES RANDOLPH AND PERCY TAYLOR,

Respondents.

AMERICAN BRANDS, INC.,

Petitioner,

—v.—

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF OF PETITIONERS THE AMERICAN TOBACCO COMPANY AND AMERICAN BRANDS, INC.

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* American Brands, Inc. has no parent, subsidiary or affiliate required to be reported under S. Ct. R. 28.1.

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I.

THE EEOC AGREES THAT § 703(h) APPLIES TO POST-ACT SENIORITY SYSTEMS AND FURTHER RECOGNIZES THAT THE BUSINESS NECESSITY DEFENSE IS INAPPROPRIATE IN A SENIORITY SYSTEM CASE

Respondent Equal Employment Opportunity Commission ("EEOC") agrees with petitioners' fundamental position in this case: seniority systems should not be deprived of § 703(h) analysis, requiring proof of intentional discrimination, simply because such systems may have been instituted or revised after July 2, 1965.

Recognizing "the important role that seniority plays in collective bargaining, and its historic importance to workers" (EEOC Br. 25), and conceding that the "business necessity" defense thus is "inappropriate" to seniority system cases (EEOC Br. 33), the EEOC also substantially agrees as to at least some of the policy reasons why the result petitioners urge should prevail.

Having made these significant concessions and finding itself unable to support the reasoning of the court of appeals, the EEOC struggles to salvage the result below by concocting a "timely challenge to adoption" theory. For the reasons discussed in Parts II and III, *infra,* the EEOC's artificial theory should be rejected as impractical and totally unfounded in policy or in law.

Even the *Patterson* respondents suggest that, because of the national labor policy favoring seniority and collective bargaining, there may be some "circumstances" under which "seniority systems adopted after the effective date of Title VII may be protected by § 703(h) despite their discriminatory impact" (*Patterson* Resp. Br. 92).

Both respondents, however, fail to appreciate the importance of the focus that § 703(h) intent analysis brings to seniority systems. The *Griggs*[1] analysis applied at trial in 1974 and

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1 *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

invoked by the court of appeals simply does not accord seniority systems the special treatment Congress has said they deserve. With its emphasis on statistical adverse impact and perpetuation of effects of past, currently non-cognizable events, the *Griggs* test prematurely ends the inquiry.[2] Under *Griggs* analysis, statistical evidence of disparate impact establishes a *prima facie* case and a conclusive inference that discrimination exists, and the employer and union are then relegated to the task of establishing the restrictive "business necessity" defense, as was required by the courts below,[3] in

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2 In the search for purposeful discrimination that § 703(h) requires, statistical evidence of disparate impact "may provide an important starting point." *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). But where legitimate reasons are present to explain any statistical disparity, "disproportionate impact alone cannot be decisive, and courts must look to other evidence to support a finding of discriminatory purpose." *City of Mobile, Ala.* v. *Bolden*, 446 U.S. 55, 70 (1980) (citations omitted). Thus, in contrast to the talismanic quality statistics acquire in *Griggs* cases, § 703(h) cases require proof by plaintiffs that the decisionmaker, *i.e.*, the employer and union, "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 279 (1979).

3 Under the typical business necessity defense as applied below (*see, e.g.*, JA 79-80) to petitioners' lines of progression, the test is "whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business," and whether there are "available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact." *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791, 798 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971).

Respondents were found below to have established a *prima facie* case solely through the use of statistics. *See, e.g.*, district court opinion on liability (JA 9) ("[e]ven without specific proof of overt or particular acts of discrimination, the statistical evidence is more than sufficient to establish a *prima facie* case of discrimination for the two branches"); and Widener, J., dissenting in *Patterson II* (JA 122) ("[t]he evidence in this case upon which the district court found liability was statistical. That court did not find 'specific proof of overt or particular acts of discrimination.' The whole case must be read with that background"). Having found discrimination solely from the statistics without any inquiry as to intent, the district court imposed liability for petitioners' failure to prove a business necessity defense, merely noting American's argument "that there is no discrimination and hence, with few exceptions, [that it need] not undertake to show any business necessity" (JA 9).

order to preclude liability for that assumed discrimination. Such a result severely undermines the national policy embodied in § 703(h) favoring seniority and collective bargaining, for it precludes any meaningful probe of intent and causes "past discrimination . . . , in the manner of original sin, [to] condemn . . . action that is not itself unlawful." *City of Mobile, Alabama* v. *Bolden,* 446 U.S. 55, 74 (1980).

Instead of *Griggs* and business necessity defense analysis, the proper inquiry for a post-Act seniority system is one that proceeds under § 703(h) and focuses on the intent existing at the time the system was instituted or revised. While the court below foreclosed this inquiry with respect to the lines of progression, it directed precisely such an examination as to the bona fides of another aspect of the seniority system, the no-transfer rule. Clearly the same analysis should apply to both aspects of this single seniority system. Even if there is a statistical adverse impact, a seniority system nonetheless should be protected by § 703(h) if the intent surrounding the adoption and maintenance of the system is benign. Otherwise, employers and unions would not be entitled to treat past acts of discrimination as "the legal equivalent of a discriminatory act which occurred before the statute was passed." *United Air Lines, Inc.* v. *Evans,* 431 U.S. 553, 558 (1977).

In this regard it must again be emphasized that petitioners have never claimed that seniority systems are immune from attack, although both respondents would have the Court erroneously believe otherwise.[4] As was previously explained in the Petition for a Writ of Certiorari (Pet. 16 n.16), the result petitioners urge would by no means ensure *per se* immunity for post-Act systems. It would remain for the lower courts to conduct evidentiary inquiries, as has been ordered here on the no-transfer rule, to determine whether the practice "is not 'bona fide,' or . . . [whether] differences in employment con-

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4 *E.g.*, "[p]etitioners assert that unless they are free to adopt such measures as the lines of progression policy without regard to the prohibitions of Title VII, they will be unable to adapt to changing circumstances" (EEOC Br. 13); § 703(h) is an "impenetrable barrier . . . immuniz[ing]" seniority systems (*Patterson* Resp. Br. 38).

ditions that it has produced are the 'result of an intention to discriminate because of race.' " *California Brewers Association* v. *Bryant*, 444 U.S. 598, 611 (1980).

Furthermore, there is simply no merit to the *Patterson* respondents' contention that unless the result below prevails, victims of discrimination will be deprived of a remedy. (*Patterson* Resp. Br. 81.) Because § 703(h) "does not foreclose attacks on the current operation of seniority systems which are subject to challenge as discriminatory," *United Air Lines, Inc.* v. *Evans*, 431 U.S. at 560, a system which is not found to be bona fide under § 703(h) will not be upheld, and the full panoply of relief, including an award of retroactive seniority, *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976), will be available.

The findings and record below with respect to petitioners' lines of progression strikingly demonstrate the difference in result between a § 703(h) intent analysis and a *Griggs* impact and business necessity defense analysis. The courts below held that six of the nine lines at issue did not meet the "business necessity" test as that test was defined by the court of appeals in *Robinson* v. *Lorillard Corp.* (*see* n. 3, *supra*), although three lines did meet that test. Presence or absence of discriminatory intent with respect to the adoption and maintenance of the lines was immaterial to the inquiry.

Had such an intent analysis been applied, a different result quite likely would have obtained. Even the EEOC recognizes that where seniority principles are at issue, it is "inappropriate to apply the 'business necessity' requirement" (EEOC Br. 33). Rather, where challenge is made to an aspect of a seniority system, the EEOC describes the proper inquiry as one which looks to whether the practice has a "business justification," serves "some substantial legitimate interest," or is "related to job performance" (EEOC Br. 40-41). That is, essentially, the same inquiry as one which looks to the intent behind the practice. Thus, the EEOC seems to concur that articulation by the employer and union of a legitimate "business justification" should negate the conclusory inference of discriminatory

animus that arises from a mere statistical showing of adverse impact or perpetuation under *Griggs. See, e.g., Texas Department of Community Affairs* v. *Burdine,* 101 S. Ct. 1089 (1981).

Indeed, the lines of progression struck down below for failure to establish a "business necessity" defense would have satisfied the EEOC's "business justification" approach. The testimony offered by respondents' own expert would have provided strong support for a finding that the six remaining lines had a "business justification," *i.e.,* were reasonably premised on an intent to satisfy business needs and not an intent to discriminate. For example, when asked on direct examination for his opinion regarding the business necessity of the line of progression which specified that an employee first had to be a machine operator before becoming a learner adjuster, respondents' expert stated: "On the basis of my understanding of that job, *I think this would be desirable* but not necessary" (Reply App. 1; emphasis added).[5] He also testified that the catcher to examiner-maker line should not "necessarily be required," although he acknowledged that an examiner should also have the qualifications to be a catcher (Reply App. 2). He testified similarly as to the line of progression from line searcher to examiner-packing. On the assistant adt-dryer operator to adt-dryer operator and assistant textile dryer operator to textile dryer operator lines, the expert's opinion was that first serving in the entry position of those lines "*would be desirable.* I don't think it's absolutely necessary . . . but being an assistant *would be a desirable entry*" (Reply App. 2; emphasis added).[6]

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5 For the convenience of the Court, relevant trial testimony of respondents' expert concerning the lines of progression is reprinted as an Appendix to this Reply Brief. References to the expert's testimony will be made by citation to "Reply App."

6 The differences perceived by respondents' own expert between the six lines which did not meet the business necessity defense test and the three which did were not substantial. That expert testified he felt that

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Thus, had a § 703(h) intent analysis and a "business justification" approach been the touchstone, all nine lines would likely have been upheld.

II.

THE "TIMELY CHALLENGE TO ADOPTION" THEORY CONJURED BY THE EEOC IN AN EFFORT TO RESCUE THE DECISION BELOW SHOULD BE REJECTED AS IMPRACTICAL AND WITHOUT BASIS IN POLICY OR LAW

Although conceding that the rationale of the court of appeals was "too broad" (EEOC Br. 11), the EEOC proceeds nonetheless to conjure a theory in an attempt to rescue the result below holding petitioners' lines of progression outside the ambit of § 703(h). In essence, the EEOC urges that the Court construe § 703(h) as containing a "distinction between the decision to *adopt* an aspect of a seniority system," which would be consigned to *Griggs* analysis, but only if timely challenged, and "the subsequent employment decisions made in *implementing* the system," (*id.*), which would be entitled to § 703(h) analysis.

This convoluted theory applying different modes of analysis to decisions "adopting" versus decisions "implementing" seniority systems is impractical and has no support in policy or in law.

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"being a learner adjuster prior to an adjuster is *correct*. I would say that would be *all right*. It seems to be a *logical way to do it*" (Reply App. 1; emphasis added). He characterized the making or packing adjuster to overhaul adjuster line simply as "sufficient. I think this is all there is to it" (Reply App. 2). Finally, he testified that the adjuster helper-prefabrication to adjuster-prefabrication line was not really "necessary. . . but I think having been assistant would be a desirable entry to prefab adjuster" (Reply App. 2). Given this testimony, there can be little question that the six lines would have passed muster under the EEOC's "business justification" formulation.

A glaring example of the problems which would be caused by the EEOC's theory follows from its own rather amazing statement that "[t]here is no need to consider the claim of sex discrimination in connection with the lines of progression at issue here" (EEOC Br. 8 n.14). For some reason, the EEOC urges this Court to ignore the fact that the trial and appeals of these cases involved both race and sex discrimination with respect to the operation of the lines of progression.[7]

The likely explanation for the EEOC's unwillingness to apply its theory to the sex discrimination charges is that those charges clearly fall outside its "timely challenge to adoption" theory. In this case, it is uncontested that while the race discrimination charges underlying the *Patterson* case were filed in January and February, 1969, the *sex* discrimination charges supporting the *EEOC* case were not filed until *April 8, 1969* (JA 6). Since no charge of *sex* discrimination was lodged until more than 90 days (the period then applicable) after the November 14, 1968 date on which the EEOC claims the lines of progression were "adopted" (*see* discussion in Part III, *infra*), the sex discrimination charges do not fit within the EEOC's "timely challenge to adoption" theory.

Thus, the absurd consequence of the EEOC's theory under its view of the facts of this case would be the application of two separate analyses to the same seniority system. As to the race discrimination charges in *Patterson, Griggs* analysis and the business necessity defense would remain applicable to the lines of progression; whereas in the *EEOC* sex discrimination case the very same system would be analyzed under § 703(h). The obvious impracticability of applying two different tests to the same system demonstrates a further reason why all seniority systems should be analyzed under § 703(h), regardless of when the system was adopted or when a charge is filed.

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7 The district court expressly held that the six lines of progression not justified by any business necessity "have perpetuated past discrimination on the basis of *sex and* race" (JA 32; emphasis added).

In addition, strong policy interests militate against the EEOC's theory. Petitioners have pointed out that the rule below consigning post-Act seniority systems to disparate impact and business necessity defense analysis will, if allowed to prevail, have a chilling effect on labor relations and affirmative action. The EEOC's "timely challenge to adoption" theory does nothing to alleviate such concerns.

Before deciding to adopt or revise a seniority system, management and labor, whether under the EEOC's theory or the rule announced below, would have to be sure that the racial and sexual breakdown within departments, lines of progression or other seniority units mirrored the relevant statistics. Under the EEOC's theory, so long as a timely charge was filed after the practice was adopted, the absence of any discriminatory intent behind the adoption would be irrelevant because no real inquiry would be made as to intent. As was equally true of the restrictive holding below, the unwarrantedly decisive role statistics would play under the EEOC's theory would foreclose an intent inquiry and frustrate the critical elements of national labor policy recognizing "the give and take of free collective bargaining [and] the specific characteristics of a particular business or industry." *California Brewers Association* v. *Bryant*, 444 U.S. at 608. The EEOC's theory thus substantially undermines the "[s]ignificant freedom [which] must be afforded employers and unions *to create* differing seniority systems" (*id.*; emphasis added).

As a further consequence of the EEOC's theory, employers and unions would be reluctant to undertake good faith changes in seniority systems. Such changes, even if intended to benefit persons covered by Title VII, would be discouraged because if the "adoption" of the change were timely challenged it would be consigned to a *Griggs* and business necessity defense analysis, making valueless any laudatory intent to lessen or eliminate discriminatory effects. The understandable inclination would be to retain pre-Act systems, or post-Act systems which

were not timely challenged at the point of adoption, in order to preserve § 703(h) bona fides analysis pursuant to *Teamsters.*[8]

This unfortunate consequence of the EEOC's theory would be exacerbated where, as in the instant case, factors extraneous to the seniority system, such as a static company and industry, declining consumer demand and increased automation severely limit promotional opportunities. To state the problem another way, a statistical "snapshot" of disparate impact taken at—or only a matter of days after—the date of adoption of a seniority change reveals little, if anything, of the good faith intent behind the change. Yet, good faith intent behind a seniority change does not become any less so simply because of when the snapshot is taken. *Cf. California Brewers,* 444 U.S. at 610 n.22 ("surely, what would be part of a 'seniority system' in an expanding labor market does not become something else in a declining labor market").[9] But the EEOC's theory, with its

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8 *International Bhd. of Teamsters* v. *United States,* 431 U.S. 324 (1977).

9 The case at bar provides a good example. In his 1970 study, *The Negro in the Tobacco Industry,* Professor Northrup reported that beginning even prior to Title VII's effective date and continuing thereafter, The American Tobacco Company had taken great strides to increase promotional opportunities for blacks. As he noted, however, declining consumer demand and increased automation severely limited job opportunities (*id.* at 66):

> In the American tobacco plants, opportunities for promotions continued to be relatively infrequent. Seniority was widened and many seniority lists combined in all plants, and Negroes were promoted to once all-white jobs. Indeed, this occurred with enough frequency in Richmond that white employees charged Negroes were favored at their expense.
>
> The facts appear to be that American has opened up all jobs to blacks, but that declining sales and continued automation preclude any significant opportunity for advancement.

The finding of liability by the district court mirrored Professor Northrup's observations (JA 8-9):

> The present system of posting and bidding adopted in 1968 is fair, although it needs, in the Court's view, further implementation. As indicated in the findings of fact, however, black and female

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narrow focus on statistics within an abbreviated time frame, would preclude any evidence of good faith intent.

There is, moreover, no foundation in law for the purported distinction between decisions "adopting" and decisions "implementing" seniority systems.[10] Certainly the plain language of the statute contains nothing which would indicate that Congress intended the "adoption" of a seniority system to be entitled to any less protection than the subsequent "implementation" of that system.[11] Whether challenge is made to its

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employees in the Richmond Branch and the Virginia Branch have been locked in their jobs as a result of prior discriminatory practices. *This is because of the static condition of the tobacco industry generally, and American in particular, and the advent of automation, both of which have limited opportunities for upward movement of present employees and for new hiring.* (Emphasis added.)

10 The EEOC suggests (*see* EEOC Br. 21) that support for its "timely challenge to adoption" theory can be divined from *Local Lodge No. 1424, Int'l Ass'n of Machinists* v. *NLRB*, 362 U.S. 411 (1960). That case, which involved an interpretation of a six-month statute of limitations in the National Labor Relations Act, did not hold that a different analysis should be applied to decisions "adopting" versus decisions later "implementing" employment practices. Rather, *Local Lodge No. 1424* held only that the adoption of an alleged unlawful labor practice was not actionable unless challenged within the period allowed by Congress in the statute of limitations. Challenges made outside that period were time-barred, whether styled as a challenge to "adoption" or as a challenge to "implementation." In any event, the *Local Lodge 1424* Court carefully restricted its holding to that case only (362 U.S. at 424 n.15):

> Our conclusion that the complaints giving rise to the judgment under review are of necessity 'based upon' the unfair labor practice of execution of the agreement, and are barred by time, *has drawn on this statute's purpose and history, and we do not assert the universal applicability of our resolution of the particular question presented for decision.* (Emphasis added.)

11 The EEOC argues that its theory is supported by legislative history, which it claims indicates that Congress' "principal purpose" (EEOC Br. 25) in enacting § 703(h) was "to protect the expectations employees acquired" (*id.* at 22) through the operation of seniority systems.

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adoption or implementation, so long as the system is bona fide and "not the result of an intention to discriminate" it should receive § 703(h) protection.

The EEOC lamely resorts to lifting the words "pursuant to" out of § 703(h) and claiming these words reveal that a "decision to adopt a seniority system is plainly not a decision made 'pursuant to' that system" (EEOC Br. 20). But such a linguistic exercise is too slim a reed to support the wholly impractical distinction which the EEOC wishes to read into the statute. Had Congress intended so fundamental a distinction, it would have expressed that intent clearly in the statutory language or in the legislative history. But Congress made no such expressions. To the contrary, neither the statutory language nor the legislative history manifest an intention that a distinction be drawn between the adoption and implementation of seniority systems.

In sum, in its contrived attempt to salvage the result below, the EEOC has advanced a "timely challenge to adoption" theory which is unworkable and unfounded in policy and in law. It raises the spectre of two different tests being applied to the same system depending solely upon when charges were filed. One test disregards the actual intent underlying the practice, whereas the other properly necessitates an intent

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According to the EEOC, "[a] timely challenge to the adoption of a seniority system does not endanger this congressional policy, for it occurs before such expectations can develop" (*id.* at 23). Even if one were to assume, *arguendo*, that this was the "principal purpose" behind § 703(h), the fallacy of the EEOC's argument is shown by its failure to recognize that, in a thriving company or industry, a considerable amount of "legitimate expectations" (*id.* at 12) can occur where there is active posting and bidding in the 240 days following the adoption or revision of a seniority system. For it must be remembered that under *Mohasco Corp.* v. *Silver*, 447 U.S. 807 (1980), charging parties in most deferral states need not file a charge until the passage of 240 days. Whether seniority "expectations" developed during that period are "legitimate" should depend on a § 703(h) intent analysis and not simply on when a charge happens to be filed.

analysis. The EEOC's theory would inhibit management and labor from adopting employment practices to meet a changing economy or industry, and would negate the incentive § 703(h) provides for making good faith efforts to overcome vestiges of past discrimination. Such a result flies in the face of Congress' intent that "significant freedom . . . be afforded employers and unions *to create* differing seniority systems." *California Brewers,* 444 U.S. at 608 (emphasis added). The EEOC's theory should be rejected and § 703(h) should be held applicable to challenges to both the adoption and implementation of post-Act seniority systems.

III.

THE EEOC'S "TIMELY CHALLENGE TO ADOPTION" THEORY SHOULD BE REJECTED IN ANY EVENT AS BEING UNSUPPORTED BY THE RELEVANT FINDING BELOW

Even were one to assume, *arguendo,* the validity of the EEOC's strained and artificial theory, the relevant factual finding below does not permit its application in this case. Under the time period then applicable, unless a charge was filed within 90 days from the date the lines were adopted, the EEOC's theory upholding the application of *Griggs* below could not work. Consequently, the EEOC contends that petitioners "developed and proposed the establishment of nine lines of progression" on November 14, 1968 (EEOC Br. 5) and that the charges filed in January and February, 1969 underlying the *Patterson* race discrimination case provide, *a fortiori,* the necessary timely challenge.

The finding below relative to the issue of the lines' adoption date, however, completely removes the linchpin of the EEOC's theory. To the extent there is any finding concerning the date of the lines' adoption, it is that of the *en banc* court of appeals, which concluded that the lines of progression policy "was not in effect at American in 1965 when Title VII went into effect, but was only *adopted in January 1968* in connection with

American's general revision of its promotional policies" (JA 142-43; emphasis added; citation and footnote omitted).[12] Since the *Patterson* charges were not filed until *one year after January 1968,* the EEOC's "timely challenge to adoption" theory does not work in this case.[13]

IV.

THE BASES OFFERED BY RESPONDENTS AS "ALTERNATIVE" SUPPORT FOR THE COURT OF APPEALS' JUDGMENT WERE NOT CONSIDERED BELOW AND REQUIRE FURTHER FACT-FINDING

Respondents seek to divert the Court from resolving the important question of § 703(h)'s application to post-Act seniority systems by asserting that two separate "alternative bases" provide "dispositive" support for the judgment below. Neither "alternative basis" was passed upon by the *en banc* court below and for that reason alone should not be considered here.

A. Whether the Lines of Progression Are Part of the Seniority System

The *Patterson* respondents state that "length of time served in the line of progression is not a factor" and that consequently

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12 Solely for purposes of the petition and this appeal, petitioners have conceded simply that the lines of progression "[came] into existence after Title VII's effective date" (Pet. 5 n.5), without specifying any particular date.

13 Contrary to both the January 1968 date and the EEOC's November 14, 1968 date, the full record, as the dissenting opinion below painstakingly documented, is "replete with evidence that the lines of progression existed for many years [even] prior to the effective date of the Act" (JA 162; footnote omitted). A remand to the district court to determine whether the lines antedated Title VII's effective date, or were actually established in January 1968 or on some other date, would have been appropriate. In any event, to the extent there is any finding at all on this issue, it is the January 1968 date found by the court of appeals, not the November 1968 date critical to the EEOC's theory.

the lines merely "impose a requirement of service in a lower job" (*Patterson* Resp. Br. 101). Based on their conception of how the lines actually worked, the *Patterson* respondents maintain the lines are not part of any seniority system, are not entitled to § 703(h) analysis and hence were properly held unlawful "under the *Griggs* rationale" (*id.* at 108).

The EEOC, while stating that it "also agrees" with the position that the lines of progression are not part of the seniority system, implicitly recognizes that the ambiguous state of the record on this issue precludes effective consideration by this Court. Without any citation to the record, the EEOC speculates, with obvious hesitation and uncertainty, that the lines were "*apparently* unlike the usual line of progression seniority scheme" and that "*[a]pparently* one day's service in a bottom job was as much benefit to an employee as 40 years' service" (EEOC Br. 35-36 n.31; emphasis added).

These various assertions notwithstanding, because the current state of the record is not clear on precisely how employees entered and moved within the lines according to seniority, the *en banc* court below expressly refrained from even considering this "alternative basis" (JA 142-43 n.3):

> Plaintiffs have contended that 703(h) has no application to the job lines of progression policy because, as administered, the policy was not a seniority system within contemplation of § 703(h). . . . *This was not, however, a factual issue directly litigated in the case and the record as presently composed is ambiguous on it.* In view of our stated basis for deciding that 703(h) has no application to seniority systems instituted after the effective date of Title VII, *we need not address this as a possible alternative basis for decision.* (Emphasis added.)

This suggested "alternative basis" thus runs contrary to the well-established rule that the Supreme Court will ordinarily refrain from passing upon a question not resolved below. *See, e.g., Youakim* v. *Miller,* 425 U.S. 231, 234 (1976) ("[o]rdinarily, this Court does not decide questions not . . .

resolved in the lower court"); *Bivens* v. *Six Unknown Narcotics Agents,* 403 U.S. 388, 397-98 (1971) ("[t]his question was not passed upon by the Court of Appeals, and accordingly we do not consider it here"); *Aetna Casualty Co.* v. *Flowers,* 330 U.S. 464, 468 (1947) (the Court will decline to consider questions "not passed upon by that court [below] nor adequately presented here"). The court below could not have been more explicit in explaining why it did not consider this question, and respondents present no exceptional circumstances justifying a departure from this Court's usual rule of restraint. *See Lawn* v. *United States,* 355 U.S. 339, 362 n.16 (1958); *Duignan* v. *United States,* 274 U.S. 195, 200 (1927).

Because the question of how employees actually exercised their seniority rights to progress within the lines was never "a factual issue directly litigated in the case" (JA 142-43 n.3), it is not possible for any of the parties to point to any express or even implicit findings of fact bearing on this issue. There is no dispute among the parties, however, that seniority governed promotions within the lines. Whether plant or job seniority or a combination of the two controlled movement of employees within the lines, all movement was governed by some measure of time served, and thus the lines of progression had nothing in common with "an educational standard, an aptitude or physical test, or a standard that gives effect to subjectivity." *California Brewers,* 444 U.S. at 609-10. Rather, a determination of who would move within any of the lines always "focuse[d] on length of employment" (*id.*). Employment rights invariably increased as the length of the employee's service increased, regardless of whether the standard of measurement was time in the plant, time in the line or some other measure of time served.

As this Court recognized in *California Brewers,* seniority systems "inevitably come in all sizes and shapes." 444 U.S. at 608. Moreover, the Congress that enacted § 703(h) did not express a preference for any particular seniority concept (*Teamsters,* 431 U.S. at 355 n.41):

> Then, as now, seniority was measured in a number of ways, including length of time with the employer, in a particular plant, in a department, in a job, or in a line of progression . . . . The legislative history contains no suggestion that any one system was preferred. (Citations omitted.)

The lines of progression here were fully consistent with core concepts of seniority. Since the principal feature of each line of progression was that "preferential treatment [was] dispensed on the basis of some measure of time served in employment," *California Brewers*, 444 U.S. at 606, the lines were even more clearly part and parcel of the seniority system than the ancillary 45-week rule accorded § 703(h) analysis in *California Brewers*.

B. Whether the Lines of Progression Are Bona Fide Under § 703(h)

The alternative basis urged by the EEOC is that, on the present state of the record, the Court can apply § 703(h) analysis and determine "that the six lines of progression are not bona fide" (EEOC Br. 37). In support of this argument, the EEOC points to the fact that the district court expressed, in 1977, the view that petitioners' seniority system was not bona fide.

However, as the *en banc* court of appeals observed in remanding the no-transfer rule for additional proof and a new determination of § 703(h) bona fides, the district court did not properly evaluate petitioners' seniority system under *Teamsters'* teachings (JA 145-46):

> We turn now to the fact that the district court in ruling on the 60(b) motion expressly concluded that in light of *Teamsters*, American's seniority system was not bona fide. . . . However, *we do not think that the record before the district court when it ruled upon the motion justified its specific conclusion that the system was not*

> *bona fide under this test. Certainly there are not in the record before us express findings of fact that would support such a conclusion. Whether there is evidence sufficient to support the requisite findings of fact is doubtful* in view of the understanding of § 703(h)'s application that reigned in this Circuit when the original record was being made. *In consequence, the present record does not permit us to conduct a principled review of the district court's ruling on this point.*
>
> Because the issue of the branch seniority system's bona fides only emerged in its present contours after the original record was made, we conclude that the relief invoked by defendants under 60(b) can only be achieved by reopening the record for additional proof and a new determination of bona fides in light of *Teamsters*. (Emphasis added; footnote and citations omitted.)

The same reasoning is equally applicable to the lines of progression aspect of the seniority system. Given the nature of the remand already deemed appropriate by the court of appeals, therefore, this Court should decline the suggestion of the EEOC to rule on the bona fides of the lines of progression and should instead direct the Fourth Circuit to include the lines with the no-transfer rule in the remand for a determination of bona fides under § 703(h).

CONCLUSION

For these reasons, the decision of the court of appeals should be reversed, the EEOC's "timely challenge to adoption" theory should be rejected, and the case should be remanded for a determination whether the lines of progression are bona fide under § 703(h) and not the result of an intention to discriminate.

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REPLY APPENDIX

[Excerpts from the July 1974 trial testimony of James L. Rigassio, an expert witness called on behalf of the *Patterson* plaintiffs, concerning the "business necessity" of American's lines of progression]

[433]

BY MR. MARSH [counsel for *Patterson* plaintiffs]:

* * *

Q. Would you indicate what the opinion is?

My question was initially: Do you have an opinion of the necessity of a person serving as a learner adjuster before becoming an adjuster?

You said you did?

[434]

A. [JAMES L. RIGASSIO] Yes, I do have an opinion, yes.

Q. And what is your opinion, sir?

A. Well, on the basis of my understanding of the job, I feel that being a learner adjuster prior to an adjuster is correct.

I would say that would be all right. It seems to be a logical way to do it.

MR. MARSH: Do you want to withdraw your objection?

MR. LEVIT [counsel for union defendants]:

No. I am going to reserve for cross-examination, Mr. Marsh.

BY MR. MARSH:

Q. Would you look at the second job?

A. Learner adjuster?

Q. And tell us whether or not he must have been a qualified operator—

A. I would say this: On the basis of my understanding of that job, I think this would be desirable but not necessary.

Q. What about three?

A. The examiner making—this is a quality control type of position. I don't really feel that having been a catcher would necessarily be required.

I would say having the qualifications to be a catcher would be fine.

[435]

Q. All right. The next job?

A. The next job, as I read it here, is examiner-packing. And again, this is a—to my understanding—a quality control type of job, and I don't really feel that being a line searcher is necessary.

Q. And number five?

A. The adt-dryer operator. Here, I would say being an assistant would be desirable. I don't think it's absolutely necessary. You could have various trainees moving to that position, but being an assistant would be a desirable entry.

Q. What about the next one?

A. Textile dryer is the same as the adt-dryer, same as the previous one.

Q. I don't believe the next one is applicable. What about the overhaul adjuster?

A. Overhaul adjuster, I think having been a qualified making or packing adjuster would be sufficient. I think this is all there is to it.

Q. What about number nine?

A. Prefab adjuster. I don't really think it's necessary to have been an oiler prior to being a prefab adjuster. Being an assistant, I would say is desirable.

Again, you could, perhaps, consider a trainee position, but I think having been assistant would be a [436] desirable entry to prefab adjuster.

MR. MARSH: Your Honor, I have no further questions of Mr. Rigassio.

THE COURT: Does the Commission have any questions?

MR. KARNES [counsel for plaintiff EEOC]: I'm sorry, Your Honor. We don't have any questions of this witness.